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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ALAN GJUROVICH, et al., Plaintiffs and Appellants, v. MORTGAGE ELECTRONIC REGISTRATION SERVICES, INC., et al., Defendants and Respondents.	F064464 (Super. Ct. No. CV-271292) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Alan Gjurovich and Star: Hills, in pro. per., for Plaintiffs and Appellants.

Severson & Werson and Jan T. Chilton for Defendants and Respondents.

-ooOoo-

In 2010, plaintiffs filed a wrongful foreclosure action against various entities and employees of those entities. The defendants filed a demurrer, which the trial court sustained without leave to amend. Plaintiffs appealed, contending they had stated valid claims or, alternatively, they should have been granted leave to amend.

[*] Before Detjen, Acting P.J., Franson, J. and Snauffer, J.

This appeal was delayed when two of the defendants filed bankruptcy. Those bankruptcy proceedings are now closed and plaintiffs' monetary claims against the entities and their employees were discharged. Consequently, we dismiss the appeal as to those entities and employees. The remaining defendants are Mortgage Electronic Registration Systems, Inc. (MERS) and an officer of MERS.

We conclude MERS did not exceed the authority granted under the deed of trust when it appointed a successor trustee. Also, the plaintiffs cannot allege a cause of action against MERS based on the theory they rescinded the loan transaction. Civil Code section 1693 provides that *nonprejudicial* delays by the rescinding party in restoring or tendering restoration of the benefits received is not a basis for denying relief. Here, MERS and the other defendants changed their positions based on plaintiffs' failure to return the loan proceeds by completing the nonjudicial foreclosure and this change in position means MERS would be prejudiced by treating the attempted rescission as valid. Thus, plaintiffs are precluded from claiming they validly rescinded the loan transaction. Lastly, plaintiffs have not demonstrated they could state a valid cause of action if granted leave to amend. Thus, the trial court did not err in sustaining the demurrer without leave to amend.

Accordingly, we affirm the judgment.

FACTS

The Secured Loan

In 2003, plaintiff Star: Hills, formerly known as Stacey Star Hills, signed a quitclaim deed changing the name on the recorded title of residential real property located on Linden Avenue in Bakersfield, California (the property) to "STAR HILLS." In 2007, Star[1] borrowed the sum of $222,000 from a lender known as MortgageIT, Inc.

[1] Plaintiffs Star: Hills and Alan Gjurovich refer to themselves by their first names in their pleadings and briefs. We adopt the same approach in this opinion.

The loan documents included a 40-year adjustable rate note and a deed of trust against the property.

The deed of trust named Star as the borrower; MortgageIT, Inc., a New York corporation, as the lender; and Old Republic Title Company as the trustee. In addition, the deed of trust stated MERS "is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns" and "is the beneficiary under this Security Instrument." The deed of trust secured the performance of Star's covenants under the note and the deed of trust, including the obligation to repay the loan. Under the deed of trust, Star irrevocably granted and conveyed the property to the trustee, in trust, with power of sale. Paragraph 24 of the deed of trust stated in part:

> "**Substitute Trustee**. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower…. [T]he successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution."

At some point, Star stopped paying on the loan. On June 16, 2008, MERS caused a "Substitution of Trustee" to be recorded. The document identified Old Republic Title Company as the original trustee under the deed of trust and stated MERS, as beneficiary under the deed of trust, "desires to substitute ETS SERVICES, LLC, as Trustee under said Deed of Trust."

Nonjudicial Foreclosure

The same day, ETS Services, LLC (ETS), in its capacity as trustee, recorded a "Notice of Default and Election to Sell Under Deed of Trust" stating (1) the property was in foreclosure because the payments were behind, (2) the property could be sold without court action, (3) the account could be brought into good standing by paying all past due

payments, which totaled $3,352.70 as of June 11, 2008, and (4) no sale date could be set until three months from the recording date of the notice of default. Four months later, in October 2008, the trustee recorded a "Notice of Trustee's Sale" setting the trustee's sale on November 13, 2008.

The trustee's sale was held as scheduled. GMAC Mortgage, LLC (GMACM), as the foreclosing beneficiary, was the highest bidder at the foreclosure sale and became the purchaser of the property. On November 26, 2008, ETS recorded a "Trustee's Deed Upon Sale" stating it conveyed all right, title and interest in the property to GMACM.

After the trustee's sale, plaintiffs refused to vacate the premises, causing GMACM to initiate unlawful detainer proceedings in 2009. In October 2009, Star signed and recorded a quitclaim deed stating she released and forever quitclaimed to Alan one half of all rights and interests in the property. After a default judgment in the unlawful detainer proceedings, GMACM obtained a writ of possession in late 2009. However, the process of evicting plaintiffs was delayed by plaintiffs' multiple bankruptcy filings and federal lawsuits. On December 8, 2010, GMACM finally was able to evict plaintiffs from the property.

GMACM transferred the property to REO Properties Corporation. The deed for this transfer was recorded on July 12, 2011. REO Properties Corporation sold the property to Martha Beatriz Campos;[2] the deed for this transfer was recorded on July 25, 2011.

[2] In April 2016, plaintiffs filed a complaint against Campos to quiet title to the property, alleging the prior foreclosure and eviction were "void" because ETS, the purported substitute trustee, had no authority to act as trustee. Campos filed a demurrer, the trial court sustained the demurrer without leave to amend, and this court affirmed the judgment of dismissal in *Gjurovich v. Campos* (Sep. 27, 2018, F074613) (nonpub. opn.).

PROCEEDINGS

In August 2010, after the foreclosure sale and prior to their eviction, plaintiffs filed a verified complaint alleging a variety of causes of action against GMACM, ETS and officers of those entities. This initial pleading did not name MERS or Bill Beckman as defendants. The named defendants filed a demurrer, which the trial court sustained with leave to amend.

In October 2011, plaintiffs filed a verified first amended complaint, which included allegations against MERS and Bill Beckman, its president and chief executive officer. Again, defendants filed a demurrer to the first amended complaint, asserting none of the 14 causes of action stated facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Plaintiffs filed an opposition. Defendants filed a reply asserting (1) plaintiffs must allege tender to move forward on their claims for wrongful foreclosure and (2) California law and the terms of the deed of trust allowed MERS to substitute the trustee and then foreclose on the property.

On November 28, 2011, the trial court held a hearing on the demurrer and took the matter under submission. Subsequently, the court issued a minute order sustaining the demurrer without leave to amend. The court denied plaintiffs' motion for leave to file a corrected first amended complaint on the ground it did not state a recognizable legal claim and, moreover, there was no justiciable claim to be stated.

On December 28, 2011, the trial court entered judgment, dismissing the action with prejudice. In February 2012, plaintiffs filed a timely notice of appeal.

Stay of Appeal

In May 2012, defendants GMACM and ETS filed bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York, which instituted an automatic stay. (11 U.S.C. § 362(a).) In August 2012, this court issued an order (1) stating portions of the present appeal were covered by the automatic bankruptcy stay, (2) notifying plaintiffs they could seek relief from the automatic stay in the bankruptcy

proceedings, and (3) imposing a stay of all proceedings to avoid a fragmented appeal. In June 2019, after being notified that final decrees were entered in the bankruptcy proceedings, this court lifted the August 2012 stay and granted plaintiffs permission to file a new opening brief.

Motion to Dismiss Appeal

In October 2019, the defendants, except MERS and Beckman, filed a motion to dismiss the appeal based on the bankruptcy orders. The moving defendants supported the motion with a request for judicial notice of orders and other documents filed in the bankruptcy proceedings. On January 23, 2020, this court entered an order granting the defendants' request for judicial notice and granting our own motion to take judicial notice of the entire file in *Gjurovich v. Campos*, case No. F074613 (Sup. Ct. No. BCV-16-100873).

DISCUSSION

I. MOTION TO DISMISS

Defendants' motion to dismiss the appeal contends plaintiffs' pursuit of this appeal violates final orders of the United States Bankruptcy Court for the Southern District of New York.[3]

A. Background

In May 2012, Residential Capital, LLC and its subsidiaries, including GMAC and ETS, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Plaintiffs did not file a proof of claim in the bankruptcy proceedings. In December 2013, the bankruptcy court filed an order confirming a second amended joint Chapter 11 plan for Residential Capital, LLC and affiliated entities. The plan includes a permanent injunction preventing anyone who holds a claim or cause of action against the released

[3] The moving defendants are GMACM, ETS, and certain of their officers and employees—namely, Nick Canale, Jr, Charles R. Hoecker, Omar Solorzano, Joseph A. Pensabene, Mark E. Lahiff, and Adam Leppo.

parties from continuing any action on claims released in the bankruptcy proceedings. The plan included a provision for the disallowance of claims that stated: "ANY AND ALL PROOFS OF CLAIM FILED AFTER THE APPLICABLE BAR DATE SHALL BE DEEMED DISALLOWED, DISCHARGED, RELEASED, AND EXPUNGED AS OF THE EFFECTIVE DATE WITHOUT ANY FURTHER NOTICE TO OR ACTION, ORDER, OR APPROVAL OF THE BANKRUPTUCY COURT …."

In May 2015, plaintiffs filed a motion for relief from the automatic stay in the bankruptcy proceedings that sought an order allowing them to proceed with their appeal in this case. In November 2015, the bankruptcy court denied their motion. The denial order stated that because plaintiffs failed to timely file proof of claim in the bankruptcy proceedings relating to their California action, their claims "against GMACM, ETS, and their former officers and/or employees … in the California Action were deemed discharged, released, and expunged as of the effective date of the Plan."

In September 2016, the bankruptcy court entered an order granting a second omnibus motion to enforce injunctive provisions in the plan and the confirmation order. The order directed the litigants listed in an attachment to take appropriate actions to dismiss their monetary claims against the debtors with prejudice within 14 days of entry of the order. The present lawsuit was the third action listed in the attachment. Plaintiffs did not comply with the order.

In April 2017, the bankruptcy court entered an order of final decree stating ETS's bankruptcy case was closed. In December 2018, the bankruptcy court entered an order of final decree stating GMACM's bankruptcy case was closed.

B. Merits of Motion to Dismiss

Clause 2 of article VI of the United States Constitution provides that the laws of the United States shall be the supreme law of the land, notwithstanding anything in the law of a state to the contrary. Pursuant to the Supremacy Clause, this court is bound by

federal bankruptcy law and the orders of the federal bankruptcy court. Thus, allowing plaintiffs to proceed with claims against GMACM, ETS and their officers and employees that have been discharged by a bankruptcy court would violate the Supremacy Clause of the United States Constitution.

Plaintiffs' objections to the motion to dismiss did not directly address the scope of the bankruptcy court's discharge order or offer any argument as to why the discharge and related injunction did not apply to them. Instead, plaintiffs' objections asserted granting the motion to dismiss would deny them their state and federal constitutional rights to due process, which plaintiffs contend include the right to a full and complete hearing on the merits of the issues raised in this appeal. This argument misunderstands the nature of the right to due process. The essence of due process is notice and the opportunity to be heard " 'at a meaningful time and in a meaningful manner.' " (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Plaintiffs have not demonstrated the bankruptcy proceedings deprived them of a meaningful opportunity to present their claim and have their arguments heard. Rather, the documents judicially noticed by this court show plaintiffs had an opportunity to and did in fact seek relief in the bankruptcy proceedings. Thus, plaintiffs had an opportunity to be heard and their rights to due process were not violated. In short, the "process" that they were "due" is set forth in the United States Bankruptcy Code and nothing in the record shows that process was not followed in the handling of plaintiffs' claims against the defendants. It follows that the entry of the discharge order and related injunction did not violate the due process clause.

Based on our review of the bankruptcy court orders, we conclude the orders bar plaintiffs from pursuing monetary claims against the moving defendants.[4] Accordingly,

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[4] Because the property was transferred to Martha Campos and plaintiffs' quiet title action was resolved in her favor, it is not possible to direct any defendant to transfer or reconvey the property to plaintiffs. The defendants no longer have any rights in the property to reconvey.

we grant the motion to dismiss the appeal as to those defendants. As a result, the claims addressed below are limited to those against MERS and Beckman for monetary damages.

II. DEMURRER BY MERS AND BECKMAN

A. Standard of Review

On appeal from a judgment dismissing an action after sustaining a general demurrer, appellate courts independently determine whether the complaint states facts sufficient to constitute a cause of action under any legal theory. (*McCall v. PacifiCare of California, Inc*. (2001) 25 Cal.4th 412, 415; see Code Civ. Proc., § 430.10, subd. (e).) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We also consider matters which may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

"[W]hen [a demurrer] is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank, supra*, 39 Cal.3d at p. 318.)

B. Authority of MERS to Appoint Substitute Trustee

1. Plaintiffs' Interpretation

Plaintiffs' opening brief states they have always maintained the purported substitution of trustee executed by MERS was unauthorized under the deed of trust (specifically, paragraph 24) and, therefore, was void ab initio. Plaintiffs contend that, because the substitution was void, the subsequent notices and other actions by ETS, the successor trustee, were void. Plaintiffs argue paragraph 24 of the deed of trust plainly

stated the "Lender" (i.e., MortgageIT, Inc.) had the option to appoint a successor trustee and MERS was not the "Lender." Plaintiffs also refer to the following language in the deed of trust:

> "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors or assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Plaintiffs interpret this provision as a limitation on the authority granted to MERS that means MERS may take action only if necessary to comply with law or custom. Furthermore, they argue the limitation, when construed with other provisions of the deed of trust, restricts the authority in paragraph 24 of the deed of trust to the "Lender." For instance, plaintiffs refer to the last sentence in paragraph 24 of the deed of trust, which states "[t]his procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution."

2. Authority Granted to MERS

Our analysis of the proper interpretation of the deed of trust begins by considering the effect of the last sentence in paragraph 24, which states "[t]his procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution." We conclude this sentence does not conflict with the provisions appointing MERS as the lender's nominee because the provisions appointing MERS to that role are not "other provisions for substitution." In other words, interpreting the word "Lender" in paragraph 24 to encompass the lender and its nominee does not result in "other provisions for substitution" governing the substitution of trustee. Rather, paragraph 24 still governed the substitution and MERS, as the lender's nominee, had the right to exercise any or all interests granted to the lender, including the lender's option to appoint a successor trustee.

Next, we consider plaintiffs' argument that MERS's appointment of ETS as the successor trustee was not authorized by the deed of trust because such an appointment was not "necessary to comply with law or custom." The wording of this phrase does not limit the type of "law" covered. Therefore, the phrase is properly interpreted to include action "necessary to comply with [contract] law [and the Civil Code]." The principles of contract law required the lender to abide by the terms of the deed of trust, which include the terms requiring the recording of an executed and acknowledged instrument with the recorder of Kern County to implement the substitution. Similarly, Civil Code[5] section 2934a addresses the appointment and authority of substituted trustees. The statute provides that the trustee under a deed of trust "may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by … all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968 …." (Former § 2934a, subd. (a)(1); Stats. 2004, ch. 177, § 5.) When this is done, the trustee named in the recorded substitution of trustee "shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents." (*Id.,* subd. (d).) "Once recorded, the substitution shall constitute *conclusive* evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section." (*Ibid.,* italics added.) Here, MERS, which was both the beneficiary named in the deed of trust and the nominee or agent for the lender, followed the statutory and contractual procedure to effectuate a substitution of trustee.

In summary, for purposes of the phrase "if necessary to comply with law," it was "necessary" to follow the terms of paragraph 24 to comply with contract law and the

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[5] All unlabeled statutory references are to the Civil Code.

Civil Code to implement a valid substitution of trustees. Any attempt to appoint a successor trustee in a manner other than that specified in paragraph 24 would have violated contract law and the Civil Code. Thus, the deed of trust, which authorized MERS "to take any action required of Lender," granted MERS the authority to take the action required by paragraph 24 for the appointment of a successor trustee. Consequently, MERS's appointment of ETS as the successor trustee was authorized and, therefore, valid. This is the same conclusion we reached in case No. F074613. Accordingly, plaintiffs cannot state a cause of action based on the claim that MERS was not authorized to appoint ETS as trustee. (See *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 12-13 [quiet title action alleged the trustee was unauthorized to conduct nonjudicial foreclosure; demurrer properly sustained because trustee had been properly substituted under the deed of trust and § 2934a].)

C. Statutory Rescission and the Failure to Tender the Debt

Plaintiffs contend the trial court violated section 1693 by sustaining the demurrer on the ground plaintiffs failed to tender the amount of the debt. The procedure for rescission of a contract is set forth in section 1691, which provides in relevant part:

> "Subject to Section 1693, to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind:
>
> "(a) Give notice of rescission to the party as to whom he rescinds; and
>
> "(b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so."

The rescinding party's failure to give notice or restore the benefits received under the contract is addressed in section 1693, which provides in full:

> "When relief based upon rescission is claimed in an action or proceeding, such relief shall not be denied because of delay in giving notice of

> rescission unless such delay has been substantially prejudicial to the other party.
>
> "A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment *unless such delay has been substantially prejudicial to the other party*; but the court may make a tender of restoration a condition of its judgment." (Italics added.)

Plaintiffs' application of this statute to the facts of this case does not address the qualifying phrase "unless such delay has been substantially prejudicial to the other party." (§ 1693.) Thus, plaintiffs' argument that "the Court can not deny Relief based on a failure to tender a debt, which is exactly what the trial Court did, Violating the Rescission Statute in California Civil Code Section 1693" does not accurately set forth the law of California. An accurate statement is that a court can deny relief when "a delay in restoring or in tendering restoration of the benefits … has been substantially prejudicial to the other party." (§ 1693.) Here, the fact that a foreclosure sale was completed in November 2008 establishes that MERS and the lender's successor in interest (i.e., GMACM) changed their position based on plaintiffs' failure to restore or tender restoration of the benefits received in the loan transaction. As a result of this change in position, the defendants would be substantially prejudiced by the delay if a cause of action based on the validity of the rescission was allowed to proceed.

Furthermore, plaintiffs' notice of rescission did not, by operation of law, impose an obligation on MERS and the other defendants to stop pursuing the nonjudicial foreclosure. Nothing in the statutory text imposes such an obligation, and plaintiffs have cited no case law or other authority suggesting a borrower need only give notice of rescission to stay a nonjudicial foreclosure proceeding. Thus, defendants did not act contrary to law in continuing with the nonjudicial foreclosure and, as a result, plaintiffs cannot state a cause of action against MERS and Beckman based on their failure to rescind the transaction. (See generally, *Garcia v. Wachovia Mortgage Corp.* (C.D.Cal.

2009) 676 F.Supp.2d 895, 901 [“ ‘Rescission is an empty remedy without [plaintiff’s] ability to pay back what she has received’ ”].) Stated another way, plaintiffs’ rescission argument does not provide a basis for concluding the loan or deed of trust had been nullified and, therefore, the foreclosure was wrongful.

D. Other Theories

Plaintiffs’ other theories of trial court error do not identify wrongs committed by MERS and Beckman, the remaining defendants. One such theory contends GMACM was not a bona fide purchaser and, thus, did not have perfected title to the property under section 2924. Similarly, the argument that the unlawful detainer judgment, writ of possession and eviction were all void ab initio as a matter of law does not identify a wrong allegedly committed by MERS.

Furthermore, plaintiffs have not carried their burden of demonstrating they could state a valid cause of action against MERS or Beckman if granted leave to amend their pleading. Thus, they have not demonstrated the trial court abused its discretion in failing to grant them leave to amend. (See *Blank, supra*, 39 Cal.3d at p. 318.)

DISPOSITION

The motion to dismiss appeal is granted as to respondents GMAC Mortgage, LLC, ETS Services, LLC, Nick Canale, Jr., Charles R. Hoecker, Omar Solorzano, Joseph A. Pensabene, Mark E. Lahiff, and Adam Leppo.

As to the remaining respondents—Mortgage Electronic Registration Systems, Inc. and Bill Beckman—the judgment is affirmed, and these respondents shall recover their costs on appeal.